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REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

February 19, 1993

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REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

IN THE UNITED STATES

REGULATORY AND LEGISLATIVE MATTERS

U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

[1] ◆ Public Interest Group Requests Emergency ETS Standard

In a letter dated February 5, 1993, the Public Citizen Health Research Group petitioned OSHA to "immediately promulgate an Emergency Temporary Standard to protect workers from [ETS] exposure." Citing the EPA Risk Assessment on ETS, the letter states there is now "widespread acceptance" that exposure constitutes a significant health hazard. If OSHA does not issue an emergency temporary standard, Public Citizen will "seriously consider" legal action against the Department of Labor, according to the letter.

The author of the letter was the research group's director Sidney Wolfe. Public Citizen reportedly petitioned OSHA in May 1987 for similar action. *See BNA Daily Labor Report*, February 9, 1993.

[2] ◆ *ASH v. Department of Labor*: Secretary of Labor Asks Court to Dismiss Petition for Review

On February 8, 1993, Secretary of Labor Robert Reich filed a motion to dismiss the petition for review filed by ASH in December 1992 in the District of Columbia Circuit Court of Appeals. *See* issue 39 of this Report, January 22, 1993.

The Secretary challenges ASH's petition by asserting that OSHA "has not made a final determination concerning the regulation of ETS and continues actively to consider the regulatory action sought by ASH." The Secretary contends that because there is no final agency action to review, the court lacks jurisdiction in the matter.

In the memorandum supporting the motion to dismiss, the Secretary refers to the 17,000 pages of material received in response to OSHA's Request for Information on indoor air, which is currently under review, and to former Labor Secretary Lynn Martin's directive to "commence rulemaking to address the hazards of occupational exposure to secondhand smoke," issued six days after the January 7 release of the EPA Risk Assessment on ETS. *See* issue 39 of this Report, January 22, 1993.

The memorandum notes that OSHA is preparing a report on the regulatory options available for the new Secretary of Labor and states that "Secretary Reich has requested that the report be completed as expeditiously as possible."

ASH v. Department of Labor, No. 92-1661 (U.S. Court of Appeals, D.C. Circuit) (filed December 22, 1992).

[3] OSHA Reform Bill Expected to be Introduced at Any Time

According to published press reports, proponents of OSHA reform legislation are optimistic of passage in the 103d Congress and expect a bill to be introduced in mid- to late February. AFL-CIO representatives say they will push for quick action on the measure.

The new bill may be very similar to the OSHA Reform Act introduced in the 102d Congress. That bill passed the labor committees in both chambers of Congress but did not reach the floor of either the House or Senate.

The Clinton administration reportedly agrees in principle with OSHA reform legislation. *See Daily Labor Report*, February 11, 1993; *BNA Washington Insider*, February 3, 1993.

Interagency Committee on Indoor Air Quality (CIAQ)

[4] ◆ CIAQ Members Discuss OSHA and EPA Efforts Related to ETS at Most Recent Meeting

CIAQ members discussed the release of the EPA Risk Assessment on ETS and OSHA's directive to com-

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mence rulemaking on ETS at their quarterly meeting on January 21, 1993.

Robert Axelrad, director of EPA's Indoor Air Division, reportedly said at the meeting that EPA's post-risk assessment plans include (i) releasing a brochure and policy guide on ETS, (ii) arranging for outside groups to help spread information about ETS, and (iii) spreading information about ETS internationally. Although the risk assessment apparently will not be published in the *Federal Register*, a data summary will be entered into EPA's Integrated Risk Information System (IRIS).

EPA officials also reported the following:

- The Indoor Air Quality Clearinghouse received 1,900 calls the week the ETS risk assessment was released and was continuing to receive more than 1,000 calls per week. In its first three months of operation, the clearinghouse reportedly received more than 5,000 inquiries, many of them dealing with carpet emissions, and distributed more than 3,000 copies of the 1988 document entitled "The Inside Story, A Guide to Indoor Air Quality."
- The agency has formed an inter-office Indoor Air Cluster charged with developing an EPA-wide strategy for indoor air.
- EPA staff expects federal indoor air legislation to be reintroduced but are uncertain how the bill will fare.

An OSHA deputy director, Frank Frodyma, reportedly told the members that OSHA's staff had recommended separating ETS from the Request for Information on indoor air more than a month prior to former Labor Secretary Lynn Martin's February 13 directive to "commence rulemaking to address the hazards of occupational exposure to secondhand smoke." *See* issue 39 of this Report, January 22, 1993. Frodyma added that OSHA was still deciding whether to seek U.S. Supreme Court review of the Eleventh Circuit opinion vacating the agency's rule setting permissible exposure limits on some 428 indoor air contaminants. *See* issue 35 of this Report, November 20, 1992.

CIAQ is an interagency committee co-chaired by EPA and OSHA.

U.S. Environmental Protection Agency (EPA)

[5] Bill Introduced to Streamline EPA Risk Reduction Procedures

A bill has been introduced in the Senate that would coordinate the development and implementation of environmental policies at EPA. S. 110 was introduced in January 1993 by New York Senator Patrick Moynihan (D).

Among other things, the bill would establish "guidelines to ensure consistency and technical quality in risk assessments." The measure also would create a Committee on Relative Risks, which would rank the relative risks of environmental problems, and a Committee on Environmental Benefits, which would estimate the quantitative benefits of reducing particular risks. Both committees would be independent from the EPA Science Advisory Board.

Congress

[6] ◆ Companion PRO-KIDS Legislation is Introduced in the House

On February 2, 1993, Representative Richard J. Durbin (D-Ill.) introduced the companion bill to the PRO-KIDS legislation that is currently pending before the Senate (S. 261). Although listed in the *Congressional Record* as a companion to S. 261 only, the House measure also incorporates the Senate's PRO-FEDS bill (S. 262). For more information about the Senate bills, *see* issue 40 of this Report, February 5, 1993.

Co-sponsored by 16 Congressmen, H.R. 710, like its Senate counterpart, would require federally-funded programs for children under the age of 18 to prohibit smoking in any portion of any indoor facility providing services to children that is not separately ventilated. The EPA would be authorized to promulgate guidelines for instituting the nonsmoking policy.

The House measure would require the imposition of the same smoking policy in every building or other structure owned or leased for use by a federal agency of the executive, legislative and judicial branches. H.R. 710 also contains the PRO-FEDS sections requiring the EPA Administrator to establish an "Environmental

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Tobacco Smoke Advisory Office" with a director within the Office of Radiation and Indoor Air.

The remarks made by Representative Durbin at the time the bill was introduced made reference to the EPA Risk Assessment on ETS. The bill has been referred to the House Committee on Energy and Commerce.

ASHRAE

[7] ◆ SSPC 62 Activities at ASHRAE's Winter Meeting

ETS reportedly was discussed in a number of contexts during the most recent general committee and subcommittee meetings of Standing Standards Project Committee 62 (SSPC 62), which is charged with revising ASHRAE Ventilation Standard 62-1989.

Some members of the Subcommittee on Source Control and Air Cleaning, citing the EPA Risk Assessment on ETS, suggested that the revised ASHRAE ventilation standard should treat ETS as an additional contaminant source requiring additional protection/removal equipment. One member asserted that 15 cfm/person is adequate for occupants' physiological needs and that ETS should be considered an "additional load." That would be a departure from existing Standard 62-1989, which generally calls for uniform prescribed ventilation rates without regard to whether smoking is allowed.

Meanwhile, the Health and Comfort Subcommittee discussed whether the revised ventilation standard should deal specifically with ETS. The subcommittee reportedly decided that the issue of ETS should be left to EPA and OSHA.

A recurring topic for discussion was the extent to which the ASHRAE ventilation standard should address health issues. Although SSPC 62 Chair Gene Tucker said he preferred a health-based standard, other members of the committee said they felt a health-based standard would be inappropriate and would unnecessarily lead to liability concerns for those involved in designing and constructing buildings.

During the meeting of the general SSPC 62 committee, Ole Fanger of the Technical University of Denmark reported on a number of projects, including human chamber studies he is conducting on ETS, an ongoing attempt to identify pollution source strengths in selected buildings in eight European countries, and the development of the European Ventilation Guidelines. According to Fanger, the European guidelines will include three levels of comfort: A, B and C. Fanger compared these levels to automobiles ranging from a Cadillac to a subcompact. Under the guidelines, Fanger said, Europeans will be asked to decide on the quality of IAQ for which they are willing to pay.

The above meetings were held on or about January 24, 1993, during the ASHRAE winter meeting in Chicago. The next meeting of SSPC 62 is scheduled for June 27, 1993, in Denver, Colorado.

California EPA

[8] Cal-EPA Issues Request for Information on ETS

On January 28, 1993, the California Environmental Protection Agency issued a Request for Information on ETS. A copy of the form letter used to make the request is attached as Appendix B.

The letter says the information generated by the request will be used by the agency's Office of Environmental Health Hazard Assessment to evaluate the alleged health effects of ETS. Although the scope of the evaluation is not discussed, a specific request is made for "information on ETS exposure and cancer, reproductive/developmental toxicity, and cardiovascular and respiratory effects."

Attached to the letter is a bibliography of literature accumulated by Cal-EPA prior to issuing the request. The subject headings for the bibliography are sudden infant death syndrome, neuropshycological and physical development in children, respiratory health effects, otitis media, peri-natal effects, exposure assessment, cancers, and animal experiments. The publication dates for the literature in the bibliography reportedly range from 1968 to early 1992.

The letter asks that information be submitted by March 15, 1993.

[9] Amendments Proposed to Proposition 65

The required warning for ETS exposure would be expanded to include "birth defects" and "other reproductive harm" under draft amendments to the Proposi-

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tion 65 warning regulations released by Cal-EPA on January 28, 1993.

The draft amendments would require the following warning:

"WARNING: This facility permits smoking, and tobacco smoke is known [to the State of California] to cause cancer. *Certain components of tobacco smoke are known [to the State of California] to cause birth defects or other reproductive harm.*"

The first sentence is identical to the existing warning. The second sentence, which is shown above in italics, is new. The language in brackets is optional.

A workshop will be held on the draft amendments on February 25 in Sacramento. Written comments may be submitted until March 1. If a decision is made to move ahead with the amendments, the state must issue a formal proposed regulation for public comment.

State and Local Governments

[10] Privacy Legislation

The term "privacy legislation" refers to state statutes which protect workers who smoke off the job or, more generally, use legal products or engage in legal activities outside the workplace.

• Alaska
A bill that would prohibit employers from discriminating against individuals who use legal products in a legal manner outside the workplace was introduced on January 27, 1993, and sent to the Senate Committee on Labor and Commerce. On February 3, 1993, the bill was reported from the committee without recommendation. *See* S.B. 69, 18th Legislature - 1st Reg. Sess. (1993). A House version of the bill was previously introduced on January 15, 1993.

• Hawaii
A bill relating to fair employment practices provides that employers cannot prohibit legal activities as a condition of employment. The bill was introduced January 27, 1993, and sent to the Senate Committees on Education, Labor and Employment, and Judiciary. *See* S.B. 1360, 17th Legislative Session - 1st Reg. Sess. (1993).

• North Dakota
A Senate bill was introduced on January 18, 1993, that would revise state policy against discrimination regarding participation in any lawful activity off an employer's premises during nonworking hours and to specify lawful activity which is not in direct conflict with the essential interests of the employer. The bill also limits the amount of damages to be awarded when an action is brought for discrimination. On February 8, 1993, the Senate adopted an amendment as recommended by the Senate Committee on Judiciary. *See* S.B. 2367, 53d Legislative Assembly - 1st Reg. Sess. (1993).

• Washington
A Senate bill was introduced on January 27, 1993, that prohibits employer discrimination for the consumption of lawful products off premises by employees during nonworking hours. It also allows employers to have insurance policies in effect that make distinctions for type of coverage based upon employees' consumption of lawful products. The bill has been sent to the Committee on Commerce and Labor. *See* S.B. 1365, 53d Legislature - Reg. Sess. (1993).

[11] ETS-Related State and Local Legislative Activities

• ◆ California
Smoking would be banned in state-owned or leased property under a bill introduced in the State Assembly on February 2, 1993. Introduced by Assemblyperson Jackie Speier (D-South San Francisco), the ban also would repeal a law that allows state departments to adopt their own smoking policies. The bill would not preempt local laws that provide more stringent requirements. The bill was sent to the Committee on Consumer Protection on February 11. *See* A.B. 291, Reg. Sess. (1993-94).

According to a press report, Speier pointed to the EPA Risk Assessment on ETS in support of the bill. Similar bills introduced last session were reportedly voted down in committee. *See* BNA *California - Safety and Health Report*, February 15, 1993.

• Hawaii
A bill that would require the Department of Human Services to establish rules prohibiting smoking in family child care homes was introduced in the House on January 22, 1993. Under the measure, providers of family child care homes would be able to designate certain rooms in their homes where smoking is permitted, provided the rooms are off-limits to the children under their care. *See* H.B. 432, 17th Legislative Session -1st Reg. Sess. (1993). A second bill, introduced in the

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Senate on January 22, 1993, would prohibit smoking in all group child care homes, group child care centers, and family child care homes during their hours of operation. *See* S.B. 831, 17th Legislative Session - 1st Reg. Sess. (1993). On January 22, 1993, a bill relating to smoking in restaurants was introduced in the House that would prohibit smoking in certain places open to the public. The measure was sent to the House Committees on Health, Economic Development and Business Concerns, and Judiciary. *See* H.B. 601, 17th Legislative Session -1st Reg. Sess. (1993).

A bill introduced on January 21, 1993, provides that each employer in the state shall adopt, implement, and maintain a written smoking policy containing a provision that if any nonsmoking employee objects to the employer about smoke in the employee's workplace, the employer shall attempt to reach a reasonable accommodation. *See* S.B. 256, 17th Legislative Session - 1st Reg. Sess. (1993).

• ◆ Kentucky

According to a news report, Governor Brereton Jones (D) signed an emergency regulation on January 27, 1993, that restricts smoking in state-owned buildings and others occupied by state workers. The smoking policy covers Kentucky's 35,000 permanent state employees, as well as seasonal and temporary workers, according to Bonnie Howell, executive director of management and fiscal affairs. Howell reportedly said that the policy is a response, in part, to the EPA Risk Assessment on ETS, as well as the Americans with Disabilities Act (ADA). Kentucky apparently has had two complaints under the ADA and Howell reportedly says, "We really had no choice but to ban smoking where these people work." She further claims more ADA accommodation requests relating to ETS seem likely.

The new policy seeks to accommodate the needs of smokers and nonsmokers and, to the extent feasible, provide a designated smoking area in each state building. Agency heads will have the responsibility of establishing smoking areas. Smoking will be allowed only in marked areas in public portions of state facilities. A private office may be designated as a smoking area if ventilation devices designed to remove smoke are installed and if smoking does not occur when nonsmokers are present. *See Government Employee Relations Report*, February 1, 1993.

• ◆ Local Governments in Massachusetts

On February 8, 1993, Boston City Councilor Charles Yancey reportedly says he will introduce an ordinance that would require Boston businesses to have a smoking policy respecting the rights of both smokers and nonsmokers. If no common ground is found among employees, the ordinance would ban smoking in the workplace. The proposed ordinance would apparently not affect restaurants, bars or at-home workplaces. Yancey is quoted as saying that tobacco use is "'increasingly dangerous and life-threatening,'" citing the EPA Risk Assessment on ETS. A similar ordinance failed in 1991, but Yancey says due to the ETS risk assessment, there is increased support for the ordinance this time. Massachusetts is reported to be the only state in New England that does not have a law protecting nonsmokers from ETS in the private sector. *See The Boston Globe*, February 9, 1993.

• ◆ Minnesota

According to a newspaper article, the House Rules and Legislative Committee passed a rule that would immediately prohibit smoking in all public places of the State Office Building, including the cafeteria and lounges. Smoking would be allowed in private offices until May 31, 1993, at which time a total ban would be instituted. The rule now goes to the full House, where it is expected to pass.

The committee chairman, Representative Alan Welle (DFL-Willmer), reportedly told the committee that it didn't have much choice in the matter. "'With the Environmental Protection Agency's recent ruling that second-hand smoke can cause lung cancer in nonsmokers, there might be the potential for lawsuits if the rule isn't passed,'" he is quoted as saying.

Approximately 50 state workers and legislators had apparently presented Welle with a petition calling for the ban. The committee explored the possibility of creating a smoking lounge with special ventilation equipment, but it was reported to have been too expensive. *See Star Tribune* (Minneapolis), February 11, 1993.

• New York

The Assembly has passed a bill that would apply smoking prohibitions to transportation facilities used by pupils regardless of their presence or absence on such facilities. The bill has been sent to the Senate Committee on Education. *See* A.B. 727, 215th General Assembly - 1st Reg. Sess. (1993).

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• Oklahoma

A House bill that would prohibit smoking in licensed nursing homes and day care centers was introduced on February 3, 1993, and was sent to the House Committee on Transportation. The bill provides for penalties of (i) a fine for first offense and (ii) imprisonment in the county jail for not more than 30 days, a fine, or both, for subsequent offenses. *See* H.B. 1015, 44th Legislature - 1st Reg. Sess. (1993).

• Tennessee

Companion bills that would prohibit smoking in elementary and secondary school buildings were introduced in the House and Senate on February 1, 1993. *See* H.B. 125 and S.B. 205, 98th General Assembly - 1st Reg. Sess. (1993).

• Utah

A Senate bill that would require businesses with smoking areas to provide information regarding the alleged health hazards of ETS to employees exposed to ETS passed the Senate and was sent to the House on February 9, 1993. *See* S.B. 67, 50th Legislature -General Sess. (1993). On January 25, 1993, a bill was introduced to prohibit smoking in public schools or facilities or on property on which those facilities are located. It also provides for designated smoking areas for adults during nonschool hours in private schools. *See* H.B. 136, 50th Legislature - General Session (1993).

• ◆ Virginia

Two bills were introduced and sent to the House Committee on General Laws on January 28, 1993. One bill would revise provisions of the Virginia Indoor Clean Air Act by prohibiting smoking in any public place or public area, authorizing localities to exceed the standards in the act, allowing proprietors to designate smoke-free buildings, and requiring placement of any smoking areas in such a way that the smoke will not be vented or recirculated into nonsmoking areas.

The second bill would require employers to furnish a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees, including, but not limited to environmental tobacco smoke as listed by the U.S. Environmental Protection Agency." *See* H.B. 2431 and H.B. 2393, Reg. Sess. (1992-93).

• Wyoming

A bill that would ban smoking in state- owned or leased buildings open to the public was introduced on January 14, 1993. The bill would establish a fine for noncompliance and grant the Capitol Building Commission rulemaking authority on this issue. The bill was reported from the Senate Committee on Labor and Federal Relations with amendment on January 25, 1993. *See* S.B. 92, 52d Legislative Session - Gen. Sess. (1993).

[12] IAQ-Related State and Local Legislative Activities

• Massachusetts

Two new bills were introduced on January 6, 1993, pertaining to ventilation standards. The first provides minimum ventilation standards in state leased and newly constructed state buildings. *See* H.B. 772, 178th General Court - Reg. Sess. (1993). The second would require public buildings to meet certain air quality ventilation standards. Both were sent to the Joint Committee on State Administration. *See* H.B. 773, 178th General Court - Reg. Sess. (1993). A third bill, also introduced on January 6, 1993, would establish an interagency coordinating council to address responsibility for public health and consumer protection concerning indoor air pollution and other threats. The bill was sent to the Joint Committee on Natural Resources and Agriculture. *See* H.B. 939, 178th General Court - Reg. Sess. (1993).

ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

[13] *Blanchard*: Argument on Motions is Set for March 3

On February 5, 1993, defendants Liggett and R.J. Reynolds filed a renewed motion to transfer venue along with a motion to strike plaintiffs' first amended complaint. Similar motions were filed on February 8 by the wholesaler/distributor defendants. The court has scheduled argument on the motions for April 30, 1993.

A court-scheduled status conference is still set for March 3; counsel for the parties are to meet on March 2.

The original plaintiffs in this case, Raye Blanchard and Tamara Reed, are mother and daughter. They allege primary-smoking injuries to Raye Blanchard's late husband, Thomas, who allegedly smoked for more than 50 years, and Raye Blanchard herself, who claims she smoked "for about ten years." In addition, Raye

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Blanchard and Tamara Reed both claim damages for unspecified "illness and disease" allegedly resulting from exposure to the ETS from cigarettes smoked by Thomas and Raye Blanchard. Twelve plaintiffs have been added to the case through supplemental and amended petitions. All of the additional plaintiffs' claims appear to relate to active smoking, with one exception. Plaintiff Pamela Kastrin Stephens claims unspecified "lung and respiratory diseases" allegedly caused by exposure to the ETS from the cigarettes smoked by her deceased father. The named defendants are purported to be the six major U.S. cigarette manufacturers, The Tobacco Institute, the Council for Tobacco Research, and a number of wholesalers and retailers. *Blanchard, et al. v. R.J. Reynolds Tobacco Company, et al.* (District Court, Galveston County, Texas) (filed July 31, 1992).

[14] *Broin*: Defendants are Granted Extension to File Brief

The Court of Appeal has granted defendants' request for an extension of time within which to respond to plaintiffs' appeal brief on dismissal of the class action allegations. The reply brief in opposition is now due on March 8, 1993.

With respect to defendants' petition for certiorari relating to plaintiffs' attempt to depose top company executives, plaintiffs were granted another extension within which to file their response to the petition. The response is now due on February 19.

At issue in this case are the claims of 30 flight attendants allegedly injured by occupational exposure to ETS. The injuries alleged by the putative class representatives include lung cancer, breast cancer and unspecified respiratory ailments. The defendants are purported to be the six major U.S. cigarette manufacturers (plus related entities), United States Tobacco Co., Dosal Tobacco Corp., the Council for Tobacco Research, The Tobacco Institute, and three other trade associations. *Broin, et al. v. Philip Morris, et al.* (Circuit Court, Dade County, Florida) (filed October 31, 1991).

[15] ◆ *Butler*: Plaintiff Serves Deposition Notices on Wholesalers

On February 4, 1993, plaintiffs served notices to take corporate-representative depositions on four non-tobacco manufacturer defendants. The depositions are currently scheduled for March 25 and 26, 1993. Each defendant is to produce the corporate officer with the most knowledge of, among other things, the EPA Risk Assessment on ETS. On February 5, defendant Brown & Williamson noticed the depositions of three insurance company agents. The depositions are scheduled for March 9.

Counsel for plaintiffs, Roe Frazer, was interviewed recently for an article in the *Wall Street Journal*. The article, which focused on the impact of the EPA Risk Assessment on ETS, quoted Frazer as saying, "'I think the EPA report is definitely going to have a major impact upon our lawsuit' because the companies will find it harder to argue that the evidence on passive smoking is inconclusive." *See Wall Street Journal*, January 7, 1993.

In this case, Burl Butler alleges that he has lung cancer and other injuries caused by exposure to ETS in the barber shop he has owned and operated for approximately 30 years. His wife, Dean, claims loss of consortium and emotional distress. The defendants are the six major U.S. cigarette manufacturers and four tobacco wholesalers. *Butler v. R.J. Reynolds Tobacco Co., et al.* (U.S. District Court, Southern District, Mississippi) (filed October 21, 1992).

[16] *Harju*: Plaintiff's Claims are Dismissed

On January 19, 1993, the court granted plaintiff Joseph Harju's motion to dismiss without prejudice. Harju had filed the motion in August 1992.

In dismissing the action, the court did not discuss the merits of Harju's motion; instead, the order addressed only a motion to dismiss under Rule 11 which had been filed by defendant McLane Sunwest.

The court denied McLane Sunwest's motion to dismiss, stating there was no evidence Harju's claims were duplicitous or that suit was brought "merely to harass the defendants. Conduct forming the basis of the charge of harassment must do more than bother, annoy or vex the complaining party."

In the case, plaintiff claims his health was damaged as a result of ETS exposure while incarcerated in the Arizona State Prison. His claims are based on negligence and strict liability. Harju is due to be released

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from prison in 1997. McLane Sunwest was apparently the only tobacco-related defendant ever served in the action, although several other tobacco companies, wholesalers and distributors had been named. *Harju v. State of Arizona* (U.S. District Court, Phoenix, Arizona) (filed June 4, 1992).

LEGAL ISSUES AND DEVELOPMENTS

[17] ◆ Workers' Comp Experts Predict Increase in ETS Claims

According to an insurance journal article, workers' compensation experts around the country are reportedly predicting that the EPA Risk Assessment on ETS will "provide some impetus for aggressive workers' compensation lawyers to file more claims." Industries in which employees are regularly exposed to ETS are likely to be fertile ground for such claims, the experts say.

The National Restaurant Association is reportedly seeking a legal opinion from outside counsel regarding the impact of ETS on workers' compensation claims, and the president of the American Correctional Health Services Association in Honolulu expects that prison guards will file more ETS-related claims.

Legal and economics experts observe, however, that there are many reasons why such claims will be rejected, including the requirement in many states' compensation laws that the exposure be "particularly related to the workplace." Where such claims are rejected, some attorneys predict that the door will be opened to common law tort litigation against employers. *See Business Insurance*, February 8, 1993.

[18] "Smokers' Rights Legislation: Should the State 'Butt Out' of the Workplace?" T.W. Sculco (Student Author), 33 Boston College L. Rev. 879 (1992)

"Smokers' rights laws" may be appropriate to protect smoking employees, but they should not be used to protect job applicants, the author of this article claims. "Unlike an employee, an applicant who smokes has not taken any steps in reliance on his or her ability to smoke." Contending that existing smokers' rights laws are "unfair" to employers, the author proposes a model statute that applies to employees but not applicants. Under the model statute, he asserts, "[e]mployers would be able to take into account the health and economic costs of smoking in their hiring decisions, and employees who were permitted to smoke when hired would be protected against unfair employment discrimination."

[19] ◆ Lobbyist Threatens ADA Lawsuit Against Legislature

A lobbyist for an animal rights group reportedly told state legislators in Connecticut that she may file a lawsuit under the Americans with Disabilities Act if they do not ban smoking at the State Capitol and Legislative Office Building.

The lobbyist, who allegedly suffers from asthma, claims that the smoke-filled corridors of the legislative complex effectively block her access to the halls of government. Her attorney, Representative Robert Farr (D-West Hartford), has reportedly filed legislation to ban smoking in public buildings and is representing the lobbyist who is one of his constituents, for free.

According to press reports, the legislative management committee has referred the request to a subcommittee for further study. *See The Hartford Courant*, February 5, 1993.

In a related story, Richard Daynard, head of the Tobacco Products Liability Project, predicts that the Americans with Disabilities Act will provide a structure for legal action against restaurants that permit smoking. According to Daynard, the law should protect those with asthma and heart or pulmonary conditions who are purportedly being denied access to public places where smoking is permitted. His remarks were quoted in an article about Massachusetts restaurants that are considering adopting smoking bans following the release of the EPA Risk Assessment on ETS. The article concludes by publishing the telephone numbers of organizations that can provide a list of the restaurants in Massachusetts that are smoke free. *See The Boston Globe*, January 29, 1993.

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SCIENTIFIC/TECHNICAL ITEMS

UPCOMING MEETINGS

[20] "Liability and Compliance in Indoor Air Quality," MidAtlantic Environmental Hygiene Resource Center, Philadelphia, Pennsylvania, April 1, 1993

According to promotional materials, this course will stress avoiding liability through prevention of IAQ problems. Topics to be discussed will include statutory and case law, effective management-employee communications during an environmental crisis, existing guidelines, and the regulatory outlook in indoor air quality.

The MidAtlantic Environmental Hygiene Resource Center was established by EPA in mid-1992 and reportedly offers "the nation's first permanent indoor environmental training programs." *See* issue 25 of this Report, July 7, 1992.

ETS EXPOSURE AND MONITORING

[21] "Passive Smoking and Tobacco Chewing Among Alaska Children: Measuring Saliva Cotinine," R.A. Etzel, D.B. Jones, C.M. Schlife, J.R. Lyke, F.W. Spierto, and J.P. Middaugh, *Journal of Smoking-Related Disorders* 3(2): 161-165, 1992 [See Appendix A]

Saliva cotinine measurements for 85 Alaskan children (three to six years old) are reported. The authors claim that 44 percent of the children had cotinine levels "consistent with passive smoking." Moreover, 3 percent apparently actively used smokeless tobacco, based on cotinine measurements.

[22] "Subchronic Inhalation Study in Rats Using Aged and Diluted Sidestream Smoke from a Reference Cigarette," C.R.E. Coggins, P.H. Ayres, A.T. Mosberg, J.W. Sagartz, and A.W. Hayes, *Inhalation Toxicology* 5: 77-96, 1993 [See Appendix A]

In this article, R.J. Reynolds researchers report on a 90-day inhalation study in which rats were exposed to aged and diluted sidestream smoke (ADSS) as a surrogate for ETS. Mild epithelial hyperplasia in the nasal cavity was reported in rats exposed to "exaggerated" smoke levels; the cellular changes were completely reversible. No histological changes were reported for either "typical" or "extreme" exposure categories. Other end points used in the study reportedly showed "no detectable biological activity" of ADSS.

[23] "Environmental Tobacco Smoke in Commercial Aircraft," D.J. Eatough, F.M. Caka, J. Crawford, S. Braithwaite, L.D. Hansen, and E.A. Lewis, *Atmospheric Environment* 26A(12): 2211-2218, 1992 [See Appendix A]

These researchers report on the development of a model for calculating the concentration of ETS constituents in airplane smoking sections, and the "penetration" of ETS into the nonsmoking section.

SMOKING POLICES AND RELATED ISSUES

[24] "Smoking Policies of Licensed Child Day-Care Centers in the United States," D.E. Nelson, J.J. Sacks, and D.G. Addis, *Pediatrics* 91(2): 460-463, 1993 [See Appendix A]

This study reports on the analysis of data from a national survey of day-care center directors with regard to employee smoking policies, in an attempt to estimate ETS exposure of children attending day-care facilities. While the authors report that 55 percent of the centers banned smoking both indoors and out, and 26 percent banned smoking indoors only, they also claim that 752,000 children will be exposed to ETS in those centers where smoking is restricted by place or time, rather than banned. This research was presented in November 1992 as an abstract at the American Public Health Association Annual Meeting. *See* Issue 38 of this Report, January 7, 1993.

OTHER DEVELOPMENTS

[25] ◆ EPA Risk Assessment on ETS Expected to Impact Employer Smoking Policies

Employers around the country are reportedly rethinking their workplace smoking policies in light of the EPA Risk Assessment on ETS. Although many companies restrict smoking to designated rooms or private offices, the lack of separate ventilation, according to the EPA, may be inadequate to protect workers.

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Spokespersons for Hewitt Associates in Illinois, A. Foster Higgins & Co. in New York, Raytheon Corp. in Massachusetts, Southern California Edison Co. in California, Belz Enterprises in Tennessee, and Dow Chemical Co. are evidently relying upon the EPA risk assessment to either increase smoking restrictions in their own facilities or advise their clients to do so. Some companies are even taking steps to prohibit smoking out of doors. The most successful strategies for implementing new policies, these spokespersons observe, involve effective communications with employees and advance notice of changes. *See Business Insurance*, February 8, 1993.

[26] ◆ Life Insurance Firm Offers Discount to Smoke-Free Workplaces

Reliance Standard Life of Philadelphia, Pennsylvania, is reportedly offering discounts on group term life insurance rates for all new policyholders who have a 100 percent smoke-free workplace. According to a Reliance Standard spokesperson, the EPA Risk Assessment on ETS suggests that a change to a smoke-free workplace can improve employees' health significantly. Reliance Life expects "mortality will improve by six percent or seven percent, conservatively." To qualify for the discount employers will have to provide a letter verifying the existence of the smoke-free workplace and a copy of the smoking policy, if written. This insurance policy is evidently available in 49 states and the District of Columbia. *See Life & Health*, February 1, 1993.

[27] ◆ Nation's Restaurateurs Face New Concerns in Wake of EPA Risk Assessment on ETS

A trade publication for restaurant owners recently published an article and commentary which discuss the ramifications of the EPA Risk Assessment on ETS with respect to the restaurant industry. Some restaurateurs reportedly are predicting "rebellion" among nonsmoking servers who may refuse to serve smoking customers and possible demands among patrons for walled-in smoking sections with separate ventilation.

According to general counsel for the Texas Restaurant Association, the EPA risk assessment is likely to fuel demands for more restrictive laws which may eventually lead to a nationwide ban on smoking in all public places. He also noted that the risk assessment may increase smoking-related liability lawsuits against restaurateurs. Hikes in insurance premiums are also regarded as potential fallout from the risk assessment. Various predictions are being made as well about what impact smoking bans will have upon consumers' dining-out habits.

The commentary concludes by warning defensive restaurateurs "to rethink strategies for dealing with customer and employee health concerns related to secondhand smoke. And with liability risks and awareness levels rising rapidly, we urge operators to tackle this volatile issue before it tackles you." *See Nation's Restaurant News Newspaper*, January 25, 1993.

[28] ◆ California Restaurant Chain Implements Smoking Ban

Citing the EPA Risk Assessment on ETS and concerns about employee and customer health, the president of Norms Restaurants, based primarily in Los Angeles and Orange Counties, announced on February 8, 1993, that smoking will be prohibited in each of its 16 locations, effective immediately. The restaurants, which are open 24 hours a day, evidently expect a temporary drop in sales based upon experience with a nonsmoking facility in Bellflower. Long term profits, however, are not expected to suffer. Company headquarters, where smoking is permitted in executive offices and employee break rooms, will reportedly be exempt from the policy. *See Business Wire*, February 8, 1993; *Los Angeles Times*, February 12, 1993.

[29] Restaurant Chain Claims Smoking Ban Has Not Harmed Business

In July 1991, California Pizza Kitchen adopted a smoking ban in all of its 27 company operated stores. According to co-chair and co-founder Larry Flax, the policy has not harmed normal sales growth since that time. The Los Angeles-based pizza and pasta chain reportedly operates restaurants in cities throughout the United States and is the only national restaurant chain that enforces a smoking ban, even on its patios. *See PR Newswire*, February 4, 1993.

[30] Nonsmokers Rights Group Presses for Smoke-free Nightclubs

Americans for Non-smokers' Rights is reportedly trying to convince nightclubs and other music venues

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to go smoke free. The movement has apparently gained the support of such musicians as Boyz II Men, En Vogue, Linda Ronstadt, John Lee Hooker, Richard Marx, Bobby McFerrin and Tuck & Patti. According to press reports, McFerrin, Tuck & Patti and the Roches, within the past four months, have requested that their shows be smoke free. *See USA Today*, February 4, 1993.

[31] ◆ Restaurant Guide Prepared in Response to EPA Risk Assessment on ETS

Public health experts have reportedly published a guide to the 175 restaurants in San Francisco that do not permit smoking. The guide, which is available free of charge, was evidently released in response to the EPA Risk Assessment on ETS. *See The San Francisco Chronicle*, February 3, 1993.

[32] ASH Issues National Survey on Smoking and Health

Earlier this month, ASH distributed to those on its mailing list a two-page "National Survey on Smoking & Health."

The first two questions in the survey relate to ETS. They ask what action, if any, the government should take with respect to smoking policies in (i) public places and (ii) private workplaces. Four answer choices are provided: Ban all smoking; permit smoking only in separate sections; only enforce decisions made by owners; or do nothing.

The other questions in the survey ask whether the government should spend more money on "antismoking education," whether the government should discontinue tobacco subsidies, whether the United States should ban tobacco advertising, and whether the government should require smokers to pay more for health insurance.

The cover letter accompanying the survey advocates the use of "citizen-supported legal action" to "guarantee every nonsmoker the right to breathe air unpolluted by tobacco smoke in all public places, including the workplace." Recipients of the letter are asked to return the completed survey along with a monetary contribution.

[33] ◆ High School Students Close Teachers' Smoking Lounge

At Wantagh High School in New York, two students responded to the EPA Risk Assessment on ETS by launching a campaign to close the teachers' smoking lounge located across the hall from their afternoon calculus class. By a vote of 88-20, school employees agreed to close the lounge after the students waged an information and lobbying campaign. The matter may be subject to collective bargaining, however, and the employees' union maintains that a ban must be negotiated. New York City schools and several districts on Long Island are reportedly smoke-free, but it is believed that this is the first time where the impetus to adopt such a policy came from students. *See Newsday*, February 13, 1993.

[34] West Virginia Poll

According to a newspaper article, a West Virginia poll indicates that 72 percent of residents favor setting aside smoking areas in hotels, motels, the workplace, and restaurants. West Virginians' attitudes apparently closely parallel national trends revealed in a December 1991 Gallup poll. That survey found 66 percent to 70 percent of people nationwide favor designated smoking areas in public. The poll was conducted by telephone interviews between January 11 and 14, 1993, the week following release of the EPA Risk Assessment on ETS. It was conducted by a polling company for the *Charleston Daily Mail*, *WSAZ Television 3* and *Associated Press*, using a random sample of 409 West Virginia residents. *See Charleston Daily Mail*, February 15, 1993.

MEDIA COVERAGE

[35] "Q and A," Real Estate Desk, *The New York Times*, February 7, 1993

A co-op shareholder wrote to *The Times* asking if she has any right to a smoke-free home. Evidently, fellow shareholders smoke heavily, and the odor of fresh and stale smoke allegedly permeates her home. She said she was writing out of concern for her health.

The answer provided was that the only way she could force fellow tenants not to smoke would be if she could prove that "the smoke is so odious that it violates the legal tenet known as the warrant of habitability." Although "environmental problems" such as excessive noise are generally prohibited by co-op by-laws and documents, the chairman of the Council of New York

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Cooperatives, who was consulted for the response, observed that there have been no known instances of any co-op board taking action to restrict owners from smoking in their own apartments.

[36] ◆ "Something New to Chew Over in the Oval Office," R. Emmett Tyrrell, Jr., *The Washington Times*, February 7, 1993

In this commentary, the author disputes the findings of the EPA Risk Assessment on ETS, calling it "shoddy science," and discusses the Clintons' decision to ban smoking in the White House. The author states that consistency will require that produce sprayed with pesticides, electric appliances emitting electromagnetic fields, and chlorinated water be banned as some studies indicate they pose greater health risks than exposure to ETS. When the Washington press corps sought to dispute claims that the Clintons do not smoke by producing photographs depicting President Bill Clinton on his campaign plane with a cigar, the President's press secretary said he doesn't smoke cigars, he chews on them. According to this commentator, our "youthful president" has devised a method of "safe smoking."

[37] Perfume Ban Sparks Controversy in San Francisco

With comparisons to the controversy over smoking bans and ETS, attention has been given in the media recently regarding the efforts of San Francisco's mayor and chief administrative officer to make public meetings accessible to those who allege they have chemical sensitivities. In November 1992, a memo was reportedly circulated to San Francisco department heads stating, "In order to allow individuals with environmental illness or multiple chemical sensitivity to attend the meeting or hearing, individuals are requested to refrain from wearing perfume or scented products."

Proscribed products include hair mousse, body lotion and clothes that have recently been to the dry cleaners.

The cosmetics industry has reportedly been unable to convince the mayor to change the ban, and a similar ban is now being considered in Marin County. On a statewide level, a group that lobbies on behalf of people with alleged chemical sensitivities has apparently asked libraries and schools to subscribe only to "fragrance free publications." Critics and commentators warn that deodorant and soap may be next on the "political correctness" agenda. *See The San Francisco Chronicle*, February 3, 1993; Transcript, *CBS Evening News*, February 12, 1993.

IN EUROPE & AROUND THE WORLD

REGULATORY AND LEGISLATIVE MATTERS

CANADA

[38] ◆ Durham Regional Council Seeks Public Input on Smoking Bylaw

The Durham Regional Council reportedly endorsed a model bylaw in December 1992 that would restrict smoking in public places to designated areas. The public health nurse for Durham Region, citing the U.S. EPA Risk Assessment on ETS, said that people are more aware of the alleged health effects of ETS exposure now, and residents are being given the opportunity to provide input into the proposed bylaw. A public meeting will be held later this winter on the matter. *See The Toronto Star*, February 11, 1993.

CHINA

[39] Government to Consider Extending Smoking Ban

According to Health and Welfare Secretary Elizabeth Wong Chien Chi-lien, the government is considering whether to extend existing smoking bans to more public places. The bans would be part of a larger package of initiatives designed to discourage smoking. *See South China Morning Post*, February 4, 1993.

HONG KONG

[40] ETS Health Warnings Now Required on Tobacco Products

The government has reportedly adopted new regulations which, among other matters, would require health warnings regarding ETS to be printed on tobacco products and cigarette packets. The warnings would state "smoking is harmful to oneself and others." *See Sing Tao Daily*, January 27, 1993.

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